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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 566

WINNIE W. SCYPHERS,

Petitioner,

vs.

ST. PAUL NATIONAL BANK.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA AND BRIEF IN SUPPORT THEREOF.

S. H. SUTHERLAND,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Winnie W. Scyphers (hereinafter called petitioner) respectfully presents this petition for a writ of certiorari to review the final judgment of the Supreme Court of Appeals of the State of Virginia, rendered October 5, 1943 (R. 67) denying an appeal from the Circuit Court of Wise County, upon the petition of petitioner and another.

Statement of the Case.

A lien creditors' suit (R. 1, 9) was instituted in the Circuit Court for Dickenson County, Virginia, which was according to law, transferred to Wise County, to be heard

with a like suit in the latter county, instituted by the St. Paul National Bank, against petitioner, and Martha Puckett. There was a reference, according to the Virginia Practice, *Bristol Iron Co.* v. *Caldwell*, 95 Va. 47, to a Commissioner to ascertain the liens and priorities. The Commissioner filed his report February 12, 1943 (R. 52), in which, among others, it showed the first lien was a deed of trust dated July 29, 1937, to secure a $3,000.00 note, executed by petitioner and her son, Hobert Scyphers, payable to the St. Paul National Bank and FHA, payable at the rate of $23.73 monthly, and which provided for a 10% attorney's fee, which provision under the Virginia law is enforceable, *Colley* v. *Summers—Parrott Hardware Co.*, 119 Va. 439, which note bears interest from April 1, 1942, and on which, with the attorney's fee added, there was due $3,028.28 (R. 16). This report showed that petitioner, Martha Puckett, and other necessary parties were not in the military services, although the evidence before him, and which under the Virginia practice is required to be returned with and as a part thereof, Va. Code, Section 6185, Appendix B, makes no mention of this, and is, therefore, without any evidence to support it. Hobert Scyphers was a proper party (R. 32). This report, over petitioners' objection, was confirmed by the Wise County Circuit Court on March 6, 1943, and Commissioners were appointed to sell petitioners' property including that conveyed by this deed of trust to secure this note (R. 53). Thereupon, according to the Virginia practice, 4 Minor's Inst. (3d) 1505; *Kendrick* v. *Whitney*, 28 Grat. (69 Va.) 651, to-wit; on April 3, 1943, petitioner and Martha Puckett filed their petition for a rehearing, and among the things set forth, exclusively for the Virginia Courts, further alleged that:

> "Hobert Scyphers, one of the makers of the $3,000, dated July 29th, 1937, and one of the beneficiaries of said note which is reported as Lien No. 1, amounting to

> $3,028.28, against the lot of land in Wise County, described in Deed Book No. 105, page 98, has been and now is in the service of the United States Army, pursuant to the Selective Service Act and has been in service for more than two years, and said Hobert Scyphers is interested and would be greatly affected by a sale of said property'' (R. 63),

and prayed that the decree of March 6, 1943, be set aside and the Commissioners to make the sale of said lands be enjoined until 60 days after Hobert Scyphers is discharged from the U. S. Army, as provided by law. The relief prayed for, in this petition, was denied on April 14, 1943, although the fact, as alleged of Hobert Scyphers' service in the Army and interest in the case was admitted (R. 64), which left the decree of sale, of March 6, 1943, in force. Thereafter, to-wit, on June 17, 1943 (R. 8), and within the time and in the manner prescribed by law, Va. Code, Sec. 6336, Appendix B, your petitioner and Martha Puckett prosecuted, to the Supreme Court of Appeals of Virginia, which is the Court of last resort of that State, their petition praying for an appeal from the decrees of the Circuit Court of Wise County of March 6, and April 14, respectively (R. 1), to the Supreme Court of Appeals of Virginia, and among several matters pertaining to State practices, said petitioner also assigned as error the following:

> ''Lien No. 1, against Winnie W. Scyphers, page 10 of the record is for a deed of trust to secure a note of $3,000.00 signed by Winnie W. Scyphers and Hobert Scyphers amounts to $3,028.28. Hobert Scyphers is in military service of the United States. He has not appeared. Article II of the Soldier's and Sailor's Civil Relief Act of 1940 requires:
>
> 'In any action or proceeding commenced in any court, if there shall be a default of any appearance by the defendant, the plaintiff, before entering judgment shall file in the court an affidavit setting forth facts show-

ing that the defendant is not in the military service * * *. If an affidavit is not filed showing that the defendant is not in the military service no judgment shall be entered without first securing an order of court directly such entry, and no such order shall be made if the defendant is in such service until after the court shall have appointed an attorney to represent the defendant and protect his interest.

'At any state thereof any action or proceeding in * * * any court in which person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter, may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf be stayed'.

"There was no attempt in this case to comply with this statute. It is alleged that this soldier's interest would be fatally affected by the sale of this property; it was well known that Hobert Scyphers is a son of Winnie W. Scyphers, and it shows he is a joint maker of this note. This tract of land conveyed to secure this debt contains the home where he was raised and where he lived when he was inducted into the service (R. 7)."

which court after a consideration thereof refused the appeal on October 5, 1943, which refusal, under the Virginia practice is a final decree (*Mathews* v. *Progress Dist. Co.*, 108 Va. 777, 780), and thus no relief was granted to Hobert Scyphers, who was and still is in the service of the armed forces of the United States, and that without a hearing, or an opportunity to be heard, contrary to the provisions of said act.

Questions Presented.

There were several questions raised in the State Court which are exclusively for it, but the following federal questions were also raised in said court:

(1) In refusing to enjoin the proceeding for the sale of the property until Hobart Scyphers could have an opportu-

nity to conduct his defense, did the Supreme Court of Appeals deny him rights given him by Soldier's and Sailor's Relief Act of 1940, as amended, 54 Stat. 1178, 1881, Ch. 888, Sec. 100, 200, 201, 203; 50 U. S. C. A., Sec. 520, 521, 523, Appx. 9, Sec. 201, as follows:

(a) Did the Court not deny him the right secured him by said Act by affirming the decree of the Circuit Court confirming the Special Commissioner's report and ordering a sale of the trust property in which he was interested, without first having an attorney appointed to represent and protect his interest, as provided by Section 200 (1) of said Act?

(b) Did not the Supreme Court of Appeals err in sustaining the lower court's decree, which refused to stay said proceedings, on application made for said Hobert Scyphers by petitioner and another as prescribed by Section 201 of said Act; especially without any finding of fact that his ability to conduct his defense was not materially affected by his military service?

(c) Did not the Supreme Court of Appeals err in sustaining the lower court's refusal to stay or enjoin the sale it had ordered, without first finding facts to justify it in holding that the ability of said Hobert Scyphers to comply with the decree of March 6, 1943, requiring the payment of more than $11,000.00 to prevent the sale of this trust property, (R. 54) was not materially affected by his military services as provided by Section 203 of said Act?

(d) Did not the Supreme Court of Appeals err in sustaining the lower court, in refusing to stay or enjoin the execution of the decree of sale, as it was apparent that Hobert Scyphers' military services materially affected his ability to conduct his defense, and his ability to prevent the sale of the trust property by discharging the liens to prevent this?

(e) Did the Supreme Court of Appeals err in refusing an appeal from Circuit Court's decree, which was an affirmation thereof?

Reasons Relied On for Allowance of Writ.

The reasons for which this petition is presented are that the State Court has decided a federal question in a way probably not in accord with the decision of this Court in *Boone* v. *Lightner,* — U. S. —, 87 L. Ed. Advance Sheets 1095, decided June 7, 1943; and has construed the Soldiers' and Sailors' Relief Act so as to deny a soldier the benefit of same; and if this Court does not grant the relief, this soldier while in service will not have any (Rule 38).

II.

Statute Involved.

This case involves the construction and application of Soldiers' and Sailors' Relief Act of October 17, 1940; 54 Stat. 1180, 1181, U. S. C. A. Appx. 520, 521, 523, 11 FCA, Appx. 9, Sec. 200, 201, 203. Appendix A. Post 12.

Wherefore your petitioner respectfully prays that a writ of certiorari issue to the Supreme Court of Appeals of Virginia, and submits hereto annexed her brief in support of her petition.

Dated December 23, 1943.

Respectfully submitted,

S. H. SUTHERLAND,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

Neither the trial court nor the Supreme Court prepared or delivered any opinion. Va. Code, Sec. 6348, as is usual in such cases.

II.

Jurisdiction.

The date of the judgment to be reviewed is October 5, 1943. The jurisdiction of the court is invoked under Sec. 240(a) of the Judicial Code as amended, C. 229, Sec. 1, 43 Stat. 938, 28 U. S. C. A. Sec. 347.

III.

Statement of the Case.

The facts stated in the foregoing petition (p. 1) are hereby adopted as a part of this brief; to which we here add: There was no affidavit as required for default judgment, nor was any attorney appointed or approved for the defendant Hobart Scyphers, and there was no finding facts to justify the court's action.

IV.

Specifications of Error.

There was no appearance by Hobart Scyphers, no affidavits, no attorney appointed to defend him, and nothing to show his military service did not materially affect his defense.

POINT I.

The Supreme Court erred in not reversing the decree of the lower court, because Hobart Scyphers had not appeared

in the case, and no affidavit was filed, nor any attorney was appointed to defend him, nor was there any finding of fact to show his ability to conduct his defense was not materially affected by his military service, and the trial court, notwithstanding entered a decree adjudicating the principles of the cause, fixing the liens, their priorities, and ordered a sale of all of petitioner's property, including that affected by the trust, unless petitioner, or some one for her, would pay all the lien debts, within twenty days, and that without any finding of fact by said court to justify its opinion that the ability of Hobart Scyphers, who was interested, to comply with said order would not be materially affected by his military service, as provided by the Soldiers' and Sailors' Relief Act.

This act must be liberally construed to protect this soldier, and:

> "Absence when one's rights or liabilities are being adjudged is usually prima facie prejudicial". *Boone* v. *Lightner*, — U. S. —, 87 L. Ed. 1099, Advanced sheets; decided June 7th, 1943.

To this presumption add the fact, that Hobart Scyphers had not appeared, and no affidavit was filed, nor any attorney appointed to defend his interest, as peremptorily required by the statute, and we have a case where he was denied all the safeguards provided for him, and the millions of others in the service, for whose protection the statute was enacted. No need to enact such laws if the courts fail to give them effect, which has been done in this case, unless this Court will lend its aid. The purpose of the Act was to strengthen the national defense, by a suspension of civil liabilities under such conditions as surround Hobart Scyphers in this case; but such laws only give the word of promise to the ear while breaking it to the heart, if courts can ignore them. No matter on whom is cast the burden of

showing his ability to make his defense is not materially affected by his military service; by the *terms* of the *act* the court must stay the proceedings against any and all persons in military service *unless there are facts sufficient to justify the opinion of the court that this is not the case.* This must appear or the stay *must* be ordered. Its appearance must precede any action of the court except to stay the proceedings.

POINT II.

The Supreme Court of Appeals erred in affirming the judgment of the trial court in refusing to enjoin or stay the proceedings as requested.

This was a lien creditors' suit, which implies, at the time, inability to pay, by petitioner. While the amount affecting this trust property, $3,028.28, is not large in comparison with present day transactions, yet it was between a class, as is evident from the record, not accustomed to transactions entering into higher brackets. We find in the record such amounts as $678.10, $559.14, $61.00, $48.80, $791.67, $317.63 (R. 24), which denotes relatively small transactions; yet such will utterly ruin a man of small means, and leave him and his family destitute, if creditors are allowed unrestrictedly to push such claims against one hard pressed while at home, much less one who can not make any defense because detained in military service, and doubly so one who must *comply with such judgments or decrees*, and at the same time expose himself to destruction while thousands of miles away, without any chance of coming into court or attending to private affairs. It is just such a case as this we have at bar the act was intended to protect. As said by Professor Wigmore, when the prototype of this act was before the committee,

> "It is the small man, or perhaps I should say the humble man, who has just himself and no agent and no

outside assets, that we don't want to forget. He is the man we are thinking about." Hearings before Senate Judiciary Committee, S. 2859, and H. R. 6361, 65th Cong. 1st and 2d Ses., p. 97.

To allow one whose primary job is that of a soldier, whose purpose is to defend himself, friends, relatives and country, to be harassed and distracted by civil litigation, was the purpose of this statute to prevent. While such is the case, he should have the satisfaction of knowing his private affairs and property are free from such assaults at home. We at home would not be secure should he be compelled to attend to such; and courts should be astute to enforce such statutes enacted for his protection in his absence. But it may be said on his return he can have this injustice undone. We reply he should not be required to do this as the price for his honorable service, but should be protected at the outset; and under our Virginia Statute, Code Sec. 6306, Appendix B, he could not recover the land but only have a lawsuit for the proceeds, which is not adequate protection. It amply appears in this record that this man's services in the army both materially affects him in conducting his defense in court and his ability to comply with the court's decree to pay or the property be sold. The actions of the Virginia Courts have failed to enforce this statute enacted for his protection; so we now humbly pray this court to do him the justice Congress in its wisdom provided.

Conclusion.

For the foregoing reasons we respectfully submit that the action of the Supreme Court of Appeals of Virginia has failed to give the protection Congress intended by the enactment of this Statute, and that the instant suit ought to be reviewed on certiorari, and a correct rule laid down by this Court, and established for the guidance of all courts in

this and other cases affected by this Act, and the cause then remanded for further proceedings accordingly.

Respectfully submitted,

S. H. SUTHERLAND, of
S. H. and GEO. C. SUTHERLAND,
Attorneys for Petitioner.

Clintwood, Virginia.
December 23, 1943.

APPENDIX A.

Acts of Congress, Oct. 17, 1940; 54 Stat. 1180, 1181, U. S. C. A. Appx. 520, 521, 523, 11 F. C. A. Appx. 9, Sec. 200, 201, 203. Sections below will be from U. S. C. A.

"§520. Default judgments; affidavits; bonds, attorneys for persons in service.

(1) In any action or proceeding commenced in any court, if there shall be a default of any appearance by the defendant, the plaintiff, before entering judgment, shall file in the court an affidavit setting forth facts showing that the defendant is not in military service. If unable to file such affidavit plaintiff shall in lieu thereof file an affidavit setting forth either that the defendant is in the military service or that plaintiff is not able to determine whether or not defendant is in such service. If an affidavit is not filed showing that the defendant is not in the military service, no judgment shall be entered without first securing an order of court directing such entry, and no such order shall be made if the defendant is in such service until after the court shall have appointed an attorney to represent defendant and protect his interest, and the court shall on application make such appointment. * * *

"(3) In any action or proceeding in which a person in military service is a party if such party does not personally appear therein or is not represented by an authorized attorney, the court may appoint an attorney to represent him; and in such case a like bond may be required and an order made to protect the rights of such person. But no attorney appointed under this Act to protect a person in military service shall have power to waive any right of the person for whom he is appointed or bind him by his acts. * * *

"§521. Stay of proceedings where military service affects conduct thereof.

"At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion,

and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service."

* * * * * * *

"§523. Stay or vacation of execution of judgments, attachments, etc.

"In any action or proceeding commenced in any court against a person in military service, before or during the period of such service, or within sixty days thereafter, the Court may, in its discretion, on its own motion, or on application to it by such person or some person on his behalf shall, unless in the opinion of the court the ability of the defendant to comply with the judgment or order entered or sought is not materially affected by reason of his military service—

"(a) Stay the execution of any judgment or order entered against such person, as provided in this Act;"

APPENDIX B.

Sections of Virginia Code of 1919 cited:

Sec. 6185: "With his report, the commissioner shall return the decrees, orders and notices under which he acted, and all the testimony upon which his report is based."

Sec. 6306. "If a sale of property be made under a decree or order of a court, and such sale be confirmed, the title of the purchaser at such sale shall not be disturbed unless within twelve months from such confirmation, the sale be set aside by the trial court or an appeal be allowed by the Supreme Court of Appeals, and an order or decree be therein afterwards entered requiring such sale to be set aside, but there may be restitution of the proceeds of sale to those entitled."

Sec. 6336: "Any person who is a party to any case in chancery wherein there is a decree or order dissolving an injunction, or requiring money to be paid, or the possession or title of property to be changed, or adjudicating the prin-

ciples of the case * * * may present a petition, if the case be in chancery for an appeal from the decree or order."

Sec. 6348: "* * * if the court shall deem the judgment, decree or order complained of plainly right, and reject the petition on that ground, the order of rejection shall so state, and no other petition therein shall afterwards be entertained."

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v.

ST. PAUL NATIONAL BANK

REPLY TO PETITION FOR CERTIORARI

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SUPREME COURT OF THE UNITED STATES

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REPLY TO PETITION FOR CERTIORARI

We respectfully submit that the Court should not grant a writ of certiorari in this case. The allegations of fact on which the petition is based are not adequately supported by evidence in the record; and, even if the facts alleged were admitted to be true, they would not be material.

The petition for certiorari is based on the following alleged facts, none of which is supported by evidence, and none of which is material:

1. "it was well known that Hobert Scyphers is a son of Winnie W. Scyphers." (Pet. p. 4).

Apparently the Court is asked to take judicial notice of this fact. The Record contains a "Petition to Re-Hear" beginning on page 58 and ending on page 64. This petition is sworn to by Winnie W. Scyphers, the present petitioner, but she does not claim that Hobert Scyphers is her son. At page 63, she swears that Hobert Scyphers is in the army "and said Hobart Scyphers is

interested and would be greatly affected by a sale of said property."

2. "It is alleged that this soldier's interest would be fatally affected by the sale of this property."

The foregoing allegation on page 4 of the present petition appears to be based on the sworn petition to re-hear that we have just quoted from. The record contains no suggestion (so far as we have been able to discover) that Hobert Scyphers would be affected either "greatly" or "fatally" or in any other way.

3. "This tract of land conveyed to secure this debt contains the home where he was raised and where he lived when he was inducted into the service." (Pet. p. 4).

The foregoing allegation of the petition does suggest that Hobert might be sentimentally affected by the foreclosure of the mortgage on the old homestead. But no Act of Congress forbids the foreclosure of mortgages or deeds of trust secured by liens on soldiers' boyhood homes; and there is no evidence in the record that Hobert Scyphers or anybody else ever lived on the premises in question.

4. "Hobert Scyphers was a proper party." (Pet. p. 2).

The petition gives a page reference in support of this allegation, namely, "(R. 32)". The name of Hobert Scyphers does not seem to be on page 32 of the Record. The very complicated litigation disclosed in the Record was a suit to collect numerous debts of the petitioner out of property belonging to the petitioner. She owned a large number of pieces of land, but, as appears on R. p. 12, she was the fee simple owner of these parcels of land. Hobert Scyphers did not have any interest in

any of the parcels. Consequently, he could not have been a proper party to this litigation.

But it is entirely immaterial whether he was a proper party or not. The fact is that he was not and is not a party to this litigation.

Since he is not a party to the suit, no decree entered in the suit could be binding on him or affect his rights in any way.

5. The petitioner complains (Pet. pages 5 and 9) that the absent soldier should have a chance to "conduct his defense" or "make his defense."

But we find no suggestion anywhere as to what that "defense" would be. Since nobody is demanding anything in these proceedings from Hobert Scyphers, there is nothing for him to defend himself against. If he should later claim that he did not sign the note which petitioner claims he signed, that defense will certainly not be prejudiced by anything that has happened in these proceedings.

The Record which petitioner has brought up does not contain the pleadings, so that it does not appear whether or not a deficiency decree has been sought even against the petitioner. But it does appear that no relief of any kind has been sought or granted against Hobert Scyphers. There is nothing to support the suggestion on page 9 of the petition that this soldier "must *comply with such judgments or decrees*, and at the same time expose himself to destruction while thousands of miles away."

The sections of the statute relied upon by the petitioner are quoted on pages 12 and 13 of the petition in the manner required by the rules of this Court. Those sections deal exclusively with the rights of soldiers

who are either plaintiffs or defendants to the pending litigation. Since Hobert Scyphers is not a plaintiff, nor a defendant, nor a party, it is clear that the Act of Congress gives him no relief.

Since the Act of Congress cannot possibly apply to one in his position it is manifest that the petition is filed solely for the purpose of delaying the foreclosure of the numerous liens described in the Record, and the petition should be denied.

Respectfully submitted,

M. M. Long
Ralph T. Catterall
Counsel for Respondent